Compensia

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Via E-Mail: (rule-comments@sec.gov)

October 4, 2010

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303
Attn: Elizabeth M. Murphy, Secretary

Re: File No. DF Title IX – Executive Compensation
Preliminary Comments on Executive Compensation Provisions of Subtitle E of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Murphy:

This letter is submitted on behalf of Compensia, Inc. ("Compensia") in response to the Securities and Exchange Commission's invitation for preliminary comments on the executive compensation provisions contained in Subtitle E of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (referred to herein as the "Act").

Compensia, which is located in San Jose and Corte Madera, California, is a management consulting firm providing executive compensation advisory services to compensation committees and senior management of knowledge-based companies. Formed in 2003 by a group of leading executive compensation experts, we advise the board compensation committees of numerous technology, life sciences, and other companies, and have extensive experience designing and implementing executive and director remuneration programs. We understand how board compensation committees function and we have assisted many of our clients, which range from recent IPOs to Fortune 500 companies, in preparing and improving their executive compensation disclosure.

We urge the Commission to take a pragmatic approach to its rulemaking obligations with respect to the executive compensation provisions of the Act. As is apparent from a careful reading of these provisions, they are, at times, both precise and vague, as well as broad and narrow. Consequently, we believe that the Commission's rules should focus on achieving the conceptual objective of each provision, without giving undue deference to their express language, which, in some instances, may be inconsistent with their intended purpose. We further believe that this approach is necessary to ensure a proper balance between the interests of investors and the potential compliance burden on companies.

To assist the Commission in this process, we offer the following comments and suggestions that we believe will enhance the implementing rules and further the stated objectives of the provisions.

I. Section 951 – Shareholder Approval of Executive Compensation

A. Advisory Vote on Executive Compensation Program

Section 951 of the Act adds new Section 14A(a) to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which, generally, requires issuers to include a resolution in their proxy materials for their annual meetings of shareholders asking shareholders to approve, in a non-binding vote, the compensation of their executive officers, as disclosed under Item 402 of Regulation S-K.

With respect to the general advisory vote on executive compensation required under Section 14A(a)(1) of the Exchange Act, we believe that the Commission should adopt rules similar to those which it adopted last year in connection with the advisory vote on executive compensation for participant's in the federal government's Troubled Assets Relief Program ("TARP") which address the following topics:

- Preliminary proxy statement

  Currently, Exchange Act Rule 14a-6(a)(7) does not require the filing of a preliminary proxy statement in connection with an advisory vote on an executive compensation program, but only in the case of a TARP recipient. We recommend that the Commission amend Exchange Act Rule 14a-6 to provide that the general advisory vote on executive compensation required by Section 14A(a)(1) also does not trigger the requirement to file a preliminary proxy statement.

  Since the advisory vote resolution will largely follow a consistent format among companies, we do not believe that a preliminary filing would serve a useful purpose. Instead, it would simply add an additional compliance requirement to an already-complex process. We also note that other compensation-related votes, such as the vote on executive compensation plans (which itself is a binding, rather than a non-binding, vote), do not currently require the filing of a preliminary proxy statement.

- Form of resolution.

  We recommend that the Commission specify the language that companies may use in presenting the advisory vote resolution to their shareholders for action. For this purpose, we believe that the current requirement set forth in Exchange Act Rule 14a-20 is illustrative. Because of the similarities between Section 14A(a)(1) and Section 111(e)(1) of Emergency Economic Stabilization Act of 2008 ("EESA"), we believe that the resolution should state that the required vote is to be based on the information presented in a company's proxy statement - the Compensation Discussion and Analysis (if required), the compensation tables, and any related material.

- Consequences of negative vote

  We note that Item 20 of Schedule 14A currently requires TARP recipients, in conjunction with the advisory vote on executive compensation programs required by Section 111(e)(1) of EESA, to briefly explain the general effect of the vote, such as whether the vote is non-binding. We recommend that the Commission, in modifying this Item or making any corresponding revision to Schedule 14A, make clear that this disclosure does not include a requirement to disclose what action is intended to be taken by the company in the event of a negative vote. We believe that, given the general nature of the vote and, correspondingly, the absence of meaningful information on the reason or reasons for a negative vote, companies would not be able to provide any helpful information to investors as to how they would respond to such a vote.

B. Advisory Vote on Frequency of Advisory Vote on Executive Compensation Program

Section 14A(a)(2) of the Exchange Act requires that, not less frequently than once every six years, issuers are required to include a resolution in their proxy materials for their annual meetings of shareholders asking shareholders whether the vote required by Section 14A(a)(1) should take place every one, two, or three years.

We believe that there are a number of interpretive issues that must be addressed in connection with the advisory vote required under Section 14A(a)(2) to facilitate appropriate planning by companies in connection with the initial vote in 2011. These include the following:

- Form and structure of advisory vote

  Section 14A(a)(2) does not indicate whether the advisory vote on the frequency of the advisory vote required by Section 14A(a)(1) is to be a choice between the three different alternatives set forth in the provision or whether a company can propose a single approach for approval or rejection by shareholders. We understand that, under Exchange Act Rule 14a-4(b)(1), in the case of a matter being submitted for shareholder action, the person being solicited is to be afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon (other than with respect to director elections). Thus, absent an amendment to Rule 14a-4, it appears that the former approach is not feasible.

  Consequently, we recommend that the Commission clarify that a company may recommend a choice between a general vote either every two or three years, with an annual vote being the default result in the event that the company's recommendation is not approved. We believe that a company-determined choice is consistent with Congressional intent as Section 14A(c) provides that the vote required by Section 14A(a)(2) is not binding on an issuer or its board of directors and Section 14A(c)(1) states that the results of the vote do not overrule a decision by the issuer or its board of directors (such as a decision about the frequency of the general advisory vote on executive compensation). Further, Section 14A(c)(4) permits shareholders to make proposals for inclusion in proxy materials related to executive compensation, which would include a proposal for an advisory vote on executive compensation to take place more frequently than otherwise provided by the company.

- Preliminary proxy statement

  For the reasons set forth above with respect to our recommendation pertaining to Section 14A(a)(1), we recommend that the Commission amend Exchange Act Rule 14a-6 to provide that the advisory vote required by Section 14A(a)(2) also does not trigger the requirement to file a preliminary proxy statement.

C. Advisory Vote on "Golden Parachute" Compensation

Section 14A(b)(2) of the Exchange Act requires that any agreements or understandings with any named executive officers concerning any type of compensation that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may be paid or become payable to or on behalf of such executive officers must be approved by shareholders pursuant to a separate non-binding vote at the meeting where shareholders are asked to approve the merger or similar extraordinary transaction that would trigger the payment of the compensation, unless such agreements or understandings have previously been subject to the vote required by Section 14A(a)(1).

- Exception to shareholder vote requirement

  We believe that, to simplify the matters upon which shareholders may be asked to vote in the event of a merger or similar extraordinary transaction, many companies will seek to take advantage of the exception to the advisory vote requirement of Section 14A(b)(2). Accordingly, to facilitate the use of this exception and avoid any ambiguities in whether an "agreement or understanding" concerning any type of compensation that is based on or otherwise relates to a merger or similar extraordinary transaction has been subject to the vote required by Section 14A(a)(1), we recommend that the Commission provide clarification of the following positions:

  - That the fact that the aggregate total of the compensation that may be paid or become payable to or on behalf of the named executive officers under any such agreement or understanding as disclosed pursuant to Item 402(j) of Regulation S-K may differ from the amount that would be disclosed in connection with an advisory vote pursuant to Section 14A(b)(2) does not preclude a company from relying on the exception.

  - That where some, but not all, of the agreements and understandings with named executive officers concerning compensation that may be paid or become payable to or on behalf of such executive officers in the event of a merger or similar extraordinary transaction have previously been subject to the advisory vote required by Section 14A(a)(1), only the agreements and understandings with named executive officers that have not previously been subject to such an advisory vote need be approved by shareholders pursuant to the advisory vote required by Section 14A(b)(2).

- That, as long as an employee stock plan (or form of award) and any features of such plan (or form of award) that provides for accelerated or greater payment in the event of a merger or similar extraordinary transaction have been fully disclosed and subject to the advisory vote required by Section 14A(a)(1), the fact that, thereafter, additional awards are made to named executive officers under such plan (or form of award) will not require such awards to be approved by shareholders pursuant to the advisory vote required by Section 14A(b)(2).

- Effect of advisory vote

  We note that the language of Section 14A(b)(2) speaks in terms of shareholders "approving" the agreement or understandings with any named executive officers concerning compensation that may be paid or become payable to or on behalf of such executive officers in the event of a merger or similar extraordinary transaction, as well as the aggregate total of all such compensation that may be paid or become payable to or on behalf of such executive officers. In view of the advisory nature of this vote, as well as the clear statements of Congressional intent as set forth in Section 14A(c) that the vote referred to in Section 14A(b)(2) shall not be binding on a company or the board of directors and may not be construed as overruling a decision by such company or board of directors, we recommend that the Commission clarify that the primary objective of the vote is the solicitation of shareholder feedback and not the approval of the underlying arrangements.

D. Disclosure of "Golden Parachute" Compensation

Section 14A(b)(1) of the Exchange Act provides that the proxy materials for a meeting of shareholders relating to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer are required to include "clear and simple" disclosure of any agreements or understandings with any named executive officers concerning any type of compensation that is based on or otherwise relates to the merger or similar extraordinary transaction and the aggregate total of all such compensation that may be paid or become payable to or on behalf of such executive officers under such arrangements or understandings.

- Content of disclosure

  We believe that, for purposes of this provision, the current disclosure required by Item 402(j) of Regulation S-K with respect to potential payments upon a termination of employment or change in control is sufficiently "clear and simple" so as to satisfy the objectives of Section 14A(b)(1). In particular, we note that Item 402(j)(1) requires, with respect to each named executive officer, the disclosure of the specific circumstances that would trigger payment or the provision of other benefits, including perquisites and health care benefits, with regard to each contract, agreement, plan, or arrangement, whether written or unwritten, that provides for payment to a named executive officer at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer's responsibilities, and Item 402(j)(2) requires registrants to describe and quantify the estimated payments and benefits that would be provided in each covered circumstance, whether they would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided.

In addition, we note that this level of disclosure is implicitly sanctioned by the exception to the advisory vote contained in Section 14A(b)(2), which contemplates that shareholders will only receive the information required by Item 402(j) where the agreements or understandings relating to a merger or similar extraordinary transaction are subject to the advisory vote required by Section 14A(a)(1).

Accordingly, we recommend that the Commission adopt rules confirming that disclosure complying with the requirements of Item 402(j) of Regulation S-K, to the extent that such disclosure relates to any agreements or understandings, and the amounts that may be paid or become payable under such agreements or understanding, that are based on or otherwise triggered by an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer, will satisfy the disclosure requirements of Section 14A(b)(1) so long as the aggregate total of all compensation that may be paid or become payable to or on behalf of a company's named executive officers is calculated using the value assigned to the company's common stock in the merger or similar extraordinary transaction.

- Named executive officers covered

Section 14A(b)(1) does not identify which named executive officers of the company are subject to the disclosure requirement. For purposes of simplicity, and consistent with the approach that the Commission has taken in other contexts, we recommend that the new disclosure requirement should apply to a company's executive officers using the same approach that is provided under Instruction 4 to Item 5.02(e) of Form 8-K. In other words, the agreements and understandings, and related amounts, subject to disclosure should be those of the company's named executive officers as reflected in its most recently-filed disclosure under Item 402(c) of Regulation S-K.

- Agreements and understandings covered

Section 14A(b)(1) expressly provides that the person making the solicitation seeking shareholder approval of an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer is to provide disclosure of any agreements or understandings that such person has with the named executive officer of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer). Consequently, on its face, the provision appears to require disclosure of the agreements or understandings between a company that is the target of a merger or similar extraordinary transaction and the named executive officers of the acquiring entity, as well as with its own named executive officers.

We recommend that, to avoid confusion and simplify compliance, the Commission clarify that the disclosure requirement:

- Applies to agreements or understandings between a company that is the target of a merger or similar extraordinary transaction and its named executive officers if such company is soliciting the approval of its shareholders for the transaction;

- Applies to agreements or understandings between a company that is the acquirer in a merger or similar extraordinary transaction and its named executive officers if such company is soliciting the approval of its shareholders for the transaction; and

- Does not apply to agreements or understandings between a company that is the acquirer in a merger or similar extraordinary transaction and the named executive officers of the target entity if such company is not soliciting the approval of its shareholders for the transaction.

E. Proposed Rulemaking Schedule

We note that the Commission's proposed schedule for rulemaking contemplates the proposal of rules related to Section 951 of the Act during the October – December 2010 timeframe and the adoption of final rules during the January – March 2011 timeframe. While we fully appreciate the challenges the Commission faces in meeting its rulemaking obligations under the Act, we urge it to address the issues presented by the advisory votes required by Section 14A(a)(2) and Section 14A(b)(2) as soon as possible.

We advise several companies that will be holding an annual meeting of shareholders shortly after January 21, 2011, the effective date of Section 951, and, in conjunction with such meetings, will be filing with the Commission and distributing proxy materials in late November or December 2010. Given the number of outstanding compliance and interpretive questions presented by Sections 14A(a)(2) (the advisory vote on the frequency of the advisory vote on executive compensation program) and 14A(b)(2) (the advisory vote on "golden parachute" compensation) – many of which we have highlighted above, it will be difficult, if not impossible, for them to comply with these new requirements in the absence of Commission guidance. For example, companies need to know how the advisory vote required by Section 14A(a)(2) is to be framed and presented. Similarly, companies seeking to avail themselves of the exception contained in Section 14A(b)(2) need to know what type of disclosure will be needed in their proxy materials to satisfy the conditions of the exception. Until the Commission proposes rules on these provisions, or provides some other form of guidance, companies will face the prospect of having to amend previously-filed proxy materials to conform to the Commission's potential rules.

We note that similar issues confront companies that are seeking or intend to seek shareholder approval of a merger or similar extraordinary transaction shortly after the effective date of Section 951 and, accordingly, will be preparing and distributing proxy materials in late 2010 or in the first half of January 2011.

II. Section 952 – Compensation Committee Independence

Section 952 of the Act adds new Section 10C to the Exchange Act which, generally, requires the Commission, by rule, to direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer, with certain exceptions, that does not (i) require the members of its compensation committee to meet enhanced independence standards and (ii) require that the compensation committee may only select compensation consultants (under direct authority for the appointment, compensation, and oversight of the work of the consultant), legal counsel, or other advisers after taking into consideration independence standards established by the Commission. In addition, enhanced disclosure will be required of whether the compensation committee retained or obtained the advice of a compensation consultant and whether the consultant's work raised any conflicts of interest, the nature of any such conflict, and how it was addressed.

A. Independence of Compensation Committees

Section 10C(a)(2) directs the Commission to promulgate rules that require each member of the compensation committee of the board of directors of a listed issuer to be a member of the board of directors and independent. Further, Section 10C(a)(3)(B) stipulates that such Commission rules are to require that, in determining the definition of the term "independence," the national securities exchanges and national securities associations are to consider relevant factors, including, among others, whether the member of the board of directors is affiliated with the listed issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

We note that this provision does not dictate that a member of the board of directors who is also an affiliate cannot be independent for purposes of Section 10C(a). For example, see the difference between this provision and Section 10A(m)(3) of the Exchange Act with respect to the independence of members of the board of directors of a listed company who serves on the audit committee of the board of directors.

We advise the compensation committee of a number of listed companies where one or more venture capital firms hold significant equity positions and also have one of their partners serving as a director and member of the compensation committee of the board of directors. In our experience, these individuals, by virtue of both their ongoing history with the listed company as well as their familiarity and experience with executive compensation practices in their industry sector, are valuable members of the compensation committee; offering a perspective and expertise which is largely in line with that of the company's shareholders. We recommend that the Commission make clear in its rules that stock ownership, whether direct or indirect, will not automatically disqualify a director from being independent for purposes of serving on the compensation committee of a listed company's board of directors. Instead, we believe that such a determination should be based on all of the relevant facts and circumstances of each individual situation, of which stock ownership would be just one consideration.

B. Independence of Compensation Consultants and Other Compensation Committee Advisers

Section 10C(b)(1) of the Exchange Act states that the compensation committee of a listed issuer may only select a compensation consultant, legal counsel, or other adviser to the compensation committee after taking into consideration factors that affect the independence of such consultant, counsel, or other adviser as identified by the Commission. For this purpose, Section 10C(b)(2) stipulates that such factors are to be competitively neutral among categories of compensation consultants, legal counsel, or other advisers and preserve the ability of compensation committees to retain the services of members of any such category. In addition, such factors must address such matters as whether the compensation consultant, legal counsel, or other adviser provides other services to the listed issuer, the amount of fees received from the issuer by the consultant, counsel, or other adviser, the policies and procedures of the consultant, counsel, or other adviser that are designed to prevent conflicts of interest, any business or personal relationship of the consultant, counsel, or other adviser with a member of the compensation committee, and any stock of the issuer owned by the consultant, counsel, or other adviser.

- Other services

  Section 10C(b)(2)(A) identifies the provision of other services to the listed issuer by the person that employs the compensation consultant, legal counsel, or other adviser as one of the factors that a compensation committee must consider in selecting a consultant, counsel, or other adviser. We recommend that the Commission make clear that, for purposes of this assessment in the case of a compensation consultant, "other services" would not include consulting related to any broad-based incentive compensation plan as, typically, these arrangements are reviewed and approved by the listed company's board of directors or compensation committee, but would include all compensation survey work, whether standardized or developed on a customized basis for a particular company, as, in our view, this service is fundamentally different from the type of executive compensation consulting contemplated by this factor. Further, we recommend that, in the case of legal counsel, "other services" would include fees for any legal services that are not directly related to advising on executive compensation and director compensation-related matters.

- Fees as a percentage of total revenue

  Section 10C(b)(2)(B) identifies the amount of fees received from the listed issuer by the person that employs the compensation consultant, legal counsel, or other adviser, as a percentage of the total revenue of the person that employs the consultant, counsel, or other adviser as a factor that a compensation committee must consider in selecting a consultant, counsel, or other adviser. While it may be implicit in the provision, we recommend that the Commission clarify that this reference to "fees" includes, in the case of a compensation consultant, both fees for executive and director compensation-related services and fees for non-executive compensation-related services and, in the case of legal counsel, both fees for executive compensation and director compensation-related services and fees for any other legal services.

  Further, we note that the provision appears to limit the information to be provided to the compensation committee to be a percentage figure rather than a specific dollar amount. We believe that this is an appropriate interpretation of the provision and, to safeguard internal privacy and minimize competitive harm concerns, we recommend that the Commission further limit the required disclosure (i) to instances where the fees represent more than a *de minimis* amount of the entity's total revenue and (ii) permit compensation consultants, legal counsel, or other advisers to respond to an inquiry for this information by simply confirming that this percentage amount falls within a given range based on a framework to be established by the Commission (for example, the amount of fees is between 5% and 10% of the compensation consultant, legal counsel, or other adviser's total revenue). We believe that such a refinement to the disclosure is appropriate and necessary in view of the sensitivity of this information given that the consultants, counsel, and advisers providing executive and director compensation-related services to compensation committees are, almost without exception, privately-held entities that do not publicly disclose their financial results. We are concerned that, absent such a refinement to the factor, inevitably information about the revenues of these entities would be leaked into the public domain, thereby creating significant adverse consequences for these businesses.

- Business or personal relationships

  Section 10C(b)(2)(D) identifies any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee as a factor that the compensation committee must consider in selecting a consultant, counsel, or other adviser.

  In our view, this factor, by virtue of its reference to "business" relationships, is intended to ensure that a compensation committee is aware of and considers situations where a prospective compensation consultant, legal counsel, or other adviser has direct business dealings with a member of the committee, as well as the often common situation where the prospective consultant, counsel, or other advisers provides services to a company whose chief executive officer or other senior executive serves as a member of the committee. We believe that it will be important for the Commission to both confirm this view and provide guidance on when other situations may give rise to a "business" relationship between a member of the compensation committee and a prospective compensation consultant, legal counsel, or other adviser.

We believe that such guidance is necessary given the "referral" nature of the compensation consulting and legal professions. Inasmuch as a member of a compensation committee may serve on more than one board of directors, and given the recent increase in the engagement of separate compensation consultants by compensation committees and the relatively small number of consulting firms that provide such services, there is a high probability that a consultant may work with a compensation committee member who also serves on the board of directors or compensation committee of another company with which the consultant has an engagement. While we believe that a compensation committee should be made aware of these type of overlapping engagements, we recommend that the Commission clarify that such engagements, without more, do not constitute a "business" relationship of the kind contemplated by this factor. Further, we recommend that the Commission clarify the types of dealings, transactions, and interests that would constitute a "business" relationship that is to be disclosed to, and evaluated by, a compensation committee.

- Stock ownership

  Section 10C(b)(2)(E) identifies any stock of the listed issuer owned by the compensation consultant, legal counsel, or other adviser as a factor that a compensation committee must consider in selecting a consultant, counsel, or other adviser. While this factor is framed in terms of an individual consultant, counsel, or other adviser, consistent with the structure of the other factors set forth in Section 10C(b)(2), we recommend that the Commission clarify that this factor requires consideration solely of the stock owned by the person (whether an individual, corporation, partnership, or other entity) that employs the consultant, counsel, or other adviser, as well as the individual or individuals who are actually working with the listed company. Further, we recommend that, to simplify compliance, stock owned indirectly through various investment vehicles, such as a mutual fund, exchange-traded fund, or similar investment vehicle, be excluded from the required assessment. Finally, we recommend that the Commission consider whether a *de minimis* ownership threshold (for example, the lesser of (i) $10,000 in fair market value or (b) 1,000 shares of the listed company's stock) would be appropriate with respect to this factor, to minimize the compliance burden that otherwise could result in monitoring the investment activities of consultants, counsel, or other advisers by their employers.

- Disclosure of consultant engagement

  Section 10C(c)(2) provides that the proxy materials for an annual meeting of the shareholders of a listed issuer must disclose whether the compensation committee retained or obtained the advice of a compensation consultant and whether the consultant's work has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

We recommend that the Commission clarify when this disclosure will be required. While it is clear that the reference to "retained" involves a formal engagement of a compensation consultant by a listed company, it is less clear when an interaction between a compensation consultant and a listed company involves the provision of "advice." For example, would a listed company that purchases an executive compensation survey from a compensation consultant, invites a compensation consultant to provide an overview of trends in executive compensation consultant, or hires a compensation consultant to assist in the preparation of its Compensation Discussion and Analysis have "obtained the advice" of the consultant? Similarly, would a compensation committee have "obtained the advice" of a compensation consultant if it merely approves a compensation peer group developed by a compensation consultant retained by the listed company? We believe that such guidance will simplify compliance with this new disclosure requirement.

We also note that, while legal counsel is expressly identified and included in Section 10C(b) pertaining to compensation committee adviser independence, Section 10C(d) does not contain a disclosure requirement comparable to Section 10C(c)(2). We believe that such disclosure is important, inasmuch as it relates to the very substance of the independence assessment that a compensation committee is required to conduct before selecting an adviser and, therefore, recommend that the Commission adopt a similar disclosure requirement for any adviser that is separately engaged by a compensation committee, including legal counsel.

- Relationship to current disclosure requirements

As noted above, Section 10C(b)(2)(A) identifies the provision of other services to the listed issuer by the person that employs the compensation consultant, legal counsel, or other adviser as one of the factors that a compensation committee must consider in selecting a consultant, counsel, or other adviser. To a limited extent, the Commission already requires companies to consider this matter, as it relates to compensation consultants, through its current fee disclosure requirement with respect to the potential conflicts of interest of compensation consultants as reflected in Item 407(e)(3)(iii) of Regulation S-K.

We recommend that the Commission clarify that, in addition to identifying and evaluating the other services provided to the company by the compensation consultant, legal counsel, or other adviser, this factor also requires an assessment of the fees paid to such consultant, counsel, or other adviser using the principles set forth in Item 407(e)(3)(iii), without regard to the $120,000 disclosure threshold.

In addition, we recommend that the Commission harmonize its current fee disclosure requirement with the assessment of other services that is now required by Section 10C(b)(2)(A). Specifically, we recommend that the Commission amend Item 407(e)(3)(iii) to require, in addition to disclosure of the aggregate fees for executive and director compensation-related services and for non-executive compensation-related services, disclosure of a description of the other services provided to the listed company.

III. Section 953 – Executive Compensation Disclosures

A. Pay Versus Performance Disclosure

Section 953(a) of the Act adds new Section 14(i) to the Exchange Act which, generally, requires the Commission to adopt rules mandating disclosure by issuers of the relationship of the compensation actually paid to their executive officers and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. This disclosure may be presented graphically or in narrative form.

- General disclosure requirement

  Section 14(i) requires issuers to provide a clear description of any compensation required to be disclosed by the issuer under Item 402 of Regulation S-K. We believe that this directive is intended to provide an opportunity for the Commission to reevaluate its current executive compensation disclosure rules with the objective of simplifying the current requirements, particularly as they relate to the Compensation Discussion and Analysis required by Item 402(b) of Regulation S-K. After four years of practice under the current system, most CD&As are anything but clear. We recommend that the Commission consider refocusing this disclosure on the central emphasis of Section 14(i) – the relationship between a company's executive compensation and corporate financial performance.

- Determination of executive compensation "actually paid"

  Section 14(i) requires issuers to disclose, in either graphic or narrative form, the relationship between executive compensation actually paid and the financial performance of the issuer. While the provision refers to "executive" compensation, we recommend that the Commission interpret this to mean the "named executive officers" of the company. We believe that such an interpretation is consistent with Congressional intent (as evidenced by the reference to Item 402 of Regulation S-K at the beginning of the provision) and would both simplify compliance by companies and understanding by investors, who, by virtue of the company's executive compensation disclosure, would have access to detailed information about the company's compensation policies and practices.

In addition, we recommend that, for purposes of identifying compensation "actually paid," the Commission limit such compensation to amounts that are paid and awarded based on the financial performance of the company. To us, this conclusion is implicit in both the purpose and language of Section 14(i). In the case of cash compensation, this would involve the amounts actually paid during a fiscal year under both short-term and long-term incentive compensation plans and arrangements. In the case of equity compensation, this would involve the grant date fair value of performance-based awards for which the performance measures are based on financial criteria. While this latter recommendation may not necessarily reflect the amount ultimately received by an executive from an equity award, it has the virtue of relative simplicity as it conforms to the Commission's current requirements for the disclosure of equity award in the Summary Compensation Table.

- Determination of the "financial performance of the issuer"

  For purposes of Section 14(i), the financial performance of a company is to be measured taking into account any change in value of the shares of stock and dividends of the company and any distributions. We recommend that, to simplify compliance and promote comparability, the Commission require all companies to use a single measure of their financial performance – cumulative total shareholder return on the class of common stock registered under section 12 of the Exchange Act. This measure is already required of each company under Item 201(e) of Regulation S-K, the Performance Graph, already sets out a way to measure a company's financial performance.

B. Pay Ratio Disclosure

Section 953(b) of the Act generally requires the Commission to amend Item 402 of Regulation S-K to mandate disclosure of the median annual total compensation of all employees (except the chief executive officer), the annual total compensation of the chief executive officer, and the ratio of the median employee annual total compensation to the chief executive officer's annual total compensation.

We recognize that the express language of this provision limits the Commission's ability to interpret the new disclosure requirement in a manner that minimizes the compliance burden for companies while, at the same time, remaining consistent with the provision's objectives. In our view, these limitations can only be addressed through legislative action, such as a technical corrections amendment.

Accordingly, our recommendations are limited to interpretations that we believe are within the Commission's authority and which do not contradict the plain language of the provision.

- Location and immediacy of disclosure

Section 953(b)(1) stipulates that the required disclosure is to be included in any company filing described in Item 10(a) of Regulation S-K, which encompasses a wide range of documents, including, among others, registration statements under the Securities Act of 1933, as amended, and registration statements, annual or other reports, and proxy and information statements under the Exchange Act.

While the Commission may not have the authority to limit the presentation of the required disclosure to proxy and information statements filed under the Exchange Act, we believe that it does have the authority to provide that the disclosure need only be current as of the last day of the last completed fiscal year for purposes of all filings made after the date of filing of the company's proxy materials related to such fiscal year. In this manner, the disclosure that is presented in each filing will be consistent with the initial disclosure contained in the company's proxy materials; the time at which acompany would first be required to disclose the annual total compensation for its chief executive officer.

In our view, this position would allow a company time to determine the median of the annual total compensation of all of its employees using the same schedule that it currently uses to make such determination for its chief executive officer, as well as ensure that this disclosure would be presented in a consistent manner for the ensuing 12 months.

While it doesn't address the compliance problems that have been raised by many companies with respect to the difficulty associated with determining the median of the annual total compensation of all of their employees (particularly companies with significant international operations), it does limit the computation to a single annual event.

- Disclosure of pay ratio

Section 953(b)(1)(C) requires disclosure of the ratio of the amount described in subparagraph (A) (the median of the annual total compensation of all employees of the issuer (except the chief executive officer) to the amount described in subparagraph (B) (the annual total compensation of the chief executive officer). We believe that this ratio is exactly the opposite of the ratio that Congress intended to be disclosed. As presently formulated, the annual total compensation of all employees would be the numerator of the equation and the annual total compensation of the chief executive officer would be the denominator. We believe that Congress intended companies to present a ratio where the annual total compensation of the chief executive officer is the numerator and the annual total compensation of all employees is the denominator. For example, if the annual total compensation of a company's chief executive officer was $3,750,000 and the median of the annual total compensation of all of its employees was $75,000, then, as currently formulated, the required disclosure would be 0.02 to 1, rather than the commonly understood calculation of 50 to 1. Accordingly, we recommend that the

Commission permit companies to satisfy the disclosure requirement of Section 953(b)(1)(C) using this latter formulation.

- Determination of "total compensation"

  Section 953(b)(2) provides that, for purposes of the required disclosure, the computation of "total compensation" is to be based on Item 402 of Regulation S-K *"as in effect on the date before the date of enactment of this Act"* (emphasis added). In our view, this limitation appears to be misapplied. Unless Congress believed that, in the future, the Commission's executive compensation disclosure rules would be unduly relaxed (or, alternatively, become unduly complex) so as to render the preparation of the required disclosure unduly burdensome for companies and/or the disclosure itself unreasonably complex for investors, we can identify no justifiable reason for requiring companies to prepare the disclosure using an out-of-date version of the rules.

  Consequently, we recommend that the Commission provide that, in addition to determining "total compensation" on the basis of Item 402 as in effect on the date before the date of enactment of the Dodd-Frank Act, it will instead be permissible to make this determination using Item 402 as in effect as of the date of the determination, as long as this variance is noted in a footnote to the required disclosure.

Finally, in spite of apparent application of Section 953(b)(1)(A) to the median annual total compensation of all a company's employees (which, we understand, is currently being interpreted to mean the company's worldwide employees), we recommend that the Commission carefully consider whether it can read this reference to mean U.S.-based employees only. We believe that such an interpretation will have a positive (and cost-effective) impact on compliance for most global and other large companies with significant foreign workforces.

IV. Section 954 – Recovery of Erroneously Awarded Compensation

Section 954 of the Act adds new Section 10D to the Exchange Act which, generally, requires the Commission, by rule, to direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not have a policy providing that, if the issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid under the restatement. In addition, enhanced disclosure will be required of an issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws.

While the general objective of Section 10D is clear, there are several ambiguities in the provision that potentially will make compliance difficult for most listed companies. Consequently, we recommend that the Commission address the following issues in its rules implementing the provision:

- Disclosure of issuer policy on incentive-based compensation

  Section 10D(b)(1) appears to establish a requirement that issuers disclose their policy on incentive-based compensation that is based on financial information required to be reported under the securities laws. We believe that this statement should be read in conjunction with the description contained in Section 10D(b)(2) concerning the recovery of erroneously awarded compensation and not as an independent disclosure requirement. In our view, the Commission's current executive compensation disclosure rules, in particular Item 402(b)(1)(v) of Regulation S-K, as well as Items 402(b)(2)(vi) and (vii) of Regulation S-K, provide an adequate basis for the disclosure of incentive-based compensation. Consequently, we recommend that the Commission not interpret Section 10D(b)(1) as creating a new disclosure requirement about incentive-based compensation.

  Alternatively, if the Commission believes that Section 10D(b)(1) does create a separate disclosure requirement, we recommend that this requirement be satisfied by identifying any types of incentive-based compensation that are based on financial information that is required to be reported in financial statements under the securities laws.

  Further, if the Commission decides to interpret Section 10D(b)(1) as creating a separate disclosure requirement, we recommend that, consistent with the compensation recovery requirement, this disclosure be limited to incentive-based compensation arrangements involving a listed company's executive officers.

  Finally, we recommend that, in view of the information about incentive-based compensation that is currently required in proxy materials pursuant to Item 402 of Regulation S-K, the Commission allow a listed company to present any required disclosure on its general corporate websites.

- Application to equity-based incentive compensation

  Although Section 10D(b)(2) refers only to stock options as a form of incentive-based compensation that is subject to a listed company's compensation recovery policy, we can see no rational basis for excluding other forms of equity-based compensation (such as restricted stock or performance shares) from the provision. However, since the provision applies solely to incentive-based compensation, we recommend that the Commission make clear that Section 10D does not apply to equity-based compensation that (i) is subject to service-based vesting conditions only, or (ii) uses performance measures that are based on financial information that is required to be reported in financial statements under the securities laws.

- Computation of three-year recovery period

  Section 10D(b)(2) stipulates that compensation is to be recovered for a period of three years, measured from the date that an issuer is "required to prepare the accounting restatement." It is unclear what event is intended to signify when a listed company becomes obligated to prepare an accounting restatement for purposes of measuring the three-year recovery period. We believe that this is supposed to be the date upon which the decision to undertake the restatement is made, not the date that the work on the restatement actually commences (or the period that the restatement is to cover).

  We recommend that the Commission establish easily-understood criteria for establishing the date when a financial restatement is required. For example, it could be the date upon which a listed company's board of directors authorizes the preparation of the financial restatement. Alternatively, where a listed company is directed to prepare an accounting restatement by a court or regulatory authority, it should be the date that the order or requirement is issued.

- Determination of "material noncompliance"

  Section 10D(b)(2) further stipulates that compensation is recoverable only upon a financial restatement resulting from material noncompliance with any financial reporting requirement under the securities laws. In this context, it is unclear what constitutes "material" noncompliance, as well as who must make this determination. Since the standards of materiality are typically based on the facts and circumstances of each particular situation, we recommend that the Commission either identify the types of situations that would constitute such noncompliance with financial reporting requirements or, at a minimum, provide examples of such situations that a listed company can then apply for purposes of making such a determination.

- Computation of amount recoverable

  Section 10D(b)(2) provides for the recovery of the amount received on the basis of erroneous data in excess of what the executive officer otherwise would have received, based on the restated financial statements. While in some cases, this amount will be obvious, we believe that it is less clear in a number of situations. For example, in the case of a performance-based stock option, it is not clear whether the amount recoverable should be determined based on the number of shares granted or the amount realized upon exercise and, in the case of the latter, whether the amount recoverable is to be based on the fair market value of the listed company's equity securities on the date of exercise, the date of sale (if subsequently sold), or the date of the financial restatement.

  Given the potential complexity of many incentive-based compensation arrangements, we recommend that the Commission establish a clear set of guidelines as to how listed companies are to calculate the amount that is recoverable under a variety of common arrangements, including different equity-based arrangements or, alternatively, a clear set of principles that can be used to make such calculations.

- Mandatory nature of recovery

  It appears that Section 10D(b)(2) is intended to operate automatically without regard to whether the recovery of the erroneously-awarded compensation is in the best interests of a listed company and its shareholders. We believe that such an interpretation would be inequitable and we urge the Commission to adopt a more pragmatic approach to the operation of the provision.

  We note that, in implementing Section 111(b)(3)(B) of EESA, which contains a compensation recovery provision applicable to TARP recipients, the Department of the Treasury applies a cost-benefit approach to recovery. Section 30.8 – Q. 8 of Department of the Treasury TARP Standards for Compensation and Corporate Governance provides that a TARP recipient must exercise its clawback rights *except to the extent it demonstrates that it is unreasonable to do so, such as, for example, if the expense of enforcing the right would exceed the amount recovered* (emphasis added).

  We recommend that the Commission establish a similar "reasonableness" standard in implementing Section 10D(b)(2).

- Scope of application

  Although not expressly addressed by Section 954 of the Act, we believe that Section 10D is to apply prospectively from the date of its effectiveness. Accordingly, it would not be applicable to a listed company's incentive-based compensation arrangements that were granted or awarded prior to such effective date. Further, given the provision's application to the executive officers of listed companies, provision must be made for the treatment of incentive-based compensation arrangements that were granted or awarded before an individual became an executive officer and before a company became a listed company. In each of these situations, to simplify compliance, we recommend that such arrangements be exempt from potential compensation recovery.

V. Section 955 – Disclosure Regarding Employee and Director Hedging

Section 955 of the Act adds new Section 14(j) to the Exchange Act which, generally, requires the Commission to adopt rules mandating disclosure of whether any employee or director (or designee of such persons) is permitted to purchase financial instruments, including prepaid variable forwards, equity swaps, collars, and exchange funds, that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held, directly or indirectly, by the employee or director.

While this provision is largely self-explanatory and self-executing, we recommend that the Commission address the following issues in its rules implementing the provision:

- Format and location of required disclosure

  It is not clear from the provision itself whether this disclosure should be presented as part of a company's executive compensation disclosure or simply located within the company's proxy materials. While Item 402(b)(2) of Regulation S-K lists a registrant's policy regarding the hedging of the economic risk of ownership of the registrant's equity securities as a possible topic for discussion in the Compensation Discussion and Analysis, such disclosure is required only to the extent material to an understanding of the registrant's executive compensation program (see Item 402(b)(2)(xiii)). In our experience, while some companies have made this topic a regular feature of their CD&A, others tend not to address this subject.

  Absent guidance from the Commission, companies will be confronted with several practical compliance issues, including where the disclosure should be presented, whether it requires a separate heading, and whether it is sufficient to simply make a statement that the company does or does not have a policy that conforms to the description set forth in Section 14(j). If the Commission expects companies to disclose how its policy varies from the description set forth in Section 14(j), then we recommend that this be made clear in the rules.

- Definition of "designee"

  The disclosure requirement of Section 14(j) applies to any employee or member of the board of directors of the issuer, or "any designee of such employee or member." It is not clear who is intended to be covered by the term "designee." Consequently, we recommend that, to facilitate compliance, the Commission define the term "designee."

VI. Section 956 – Enhanced Compensation Structure Reporting

No comments.

VII. Section 957 – Voting By Brokers

Section 957 of the Act amends Section 6(b) of the Exchange Act, which sets forth the requirements for registration of a national securities exchanges, to prohibit any member that is not the beneficial owner of a security registered under section 12 from granting a proxy to vote the security in connection with a shareholder vote with respect to the election of a member of the board of directors of an issuer, executive compensation, or any other significant matter, as determined by the Commission, by rule, unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.

While no Commission rulemaking is required in connection with this provision, in view of the interest in, and scrutiny of, executive compensation matters, we recommend that the Commission adopt a rule setting forth a non-exhaustive list of the executive compensation matters that are subject to the prohibition.

Clearly, the prohibition is intended to apply to the shareholder votes under Section 951 of the Dodd-Frank Act: the advisory vote on executive compensation (Section 14A(a)(1) of the Exchange Act), the vote on the frequency of the advisory vote (Section 14A(a)(2) of the Exchange Act), and the advisory vote on golden parachutes (Section 14A(b) of the Exchange Act). It would be helpful to companies to clarify the other types of compensation-related matters to which the prohibition is intended to apply (for example, does it apply to the approval of compensation plans and arrangements seeking to qualify for the "performance-based compensation" exception of Section 162(m) of the Internal Revenue Code)?

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We appreciate the opportunity to provide our preliminary comments on the executive compensation provisions of the Act, and respectfully request that the Commission consider the recommendations set forth in this letter. We are prepared to meet and discuss these matters with the Commission and its staff at its convenience. Any questions about this letter may be directed to the undersigned at (415) 462-2995.

Respectfully submitted,

Mark A. Borges